

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION**

BH SERVICES INC.,	)	
For itself as Sponsor and Fiduciary	)	
and for the BH SERVICES, INC.	)	
HEALTH AND WELFARE PLAN,	)	CIV. 16-5045-JLV
	)	
Plaintiffs,	)	
v.	)	<b>REPLY IN SUPPORT OF FCE BENEFIT ADMINISTRATORS, INC.'S MOTION TO DISMISS COMPLAINT</b>
FCE BENEFIT ADMINISTRATORS	)	
INC., TRUST MANAGEMENT	)	
SERVICES, ACEC MW AND	)	
TRANSAMERICA LIFE INSURANCE	)	
COMPANY	)	
	)	
Defendants,	)	

**I. INTRODUCTION**

The Motion to Dismiss (Documents 20-22) the original Complaint (Document 1), previously filed by Defendant FCE Benefit Administrators, Inc. (“FCE”), was rendered moot when Plaintiffs filed their First Amended Complaint (Document 28) on October 28, 2016.<sup>1</sup> For some unknown reason, however, Plaintiffs nevertheless filed an Opposition (Document 32) to FCE’s Motion to Dismiss on November 1, 2016, after filing their First Amended Complaint. FCE files this reply out of an abundance of caution, asking this

---

<sup>1</sup> FCE’s Motion to Dismiss was originally filed in error on October 7, 2016 (Documents 17-18). FCE subsequently re-filed the corrected Motion and supporting documents (Documents 20-22) on October 11, 2016 after receiving notice of the error on that date.

Court to disregard Plaintiffs' Opposition as the previously filed Motion to Dismiss the original Complaint is now moot.

## II. LEGAL ARGUMENT

Filing an amended complaint while a motion to dismiss is pending renders the motion to dismiss moot. *See Janis v. Nelson* 2009 WL 4505933 at \*1 (D.S.D. Nov. 24, 2009) (“Because these motions to dismiss were filed prior to and do not address plaintiffs’ first amended complaint, the motions to dismiss are rendered moot.”); *Onyiah v. St. Cloud State U.*, 655 F. Supp. 2d 948, 954 (D. Minn. 2009) (“[A]s a general proposition, if a defendant files a Motion to Dismiss, and the plaintiff later files an Amended Complaint, the amended pleading renders the defendant’s Motion to Dismiss moot.” (citations omitted)). Accordingly, FCE’s pending Motion to Dismiss the original Complaint (Document 1) became moot when Plaintiffs filed their First Amended Complaint (Document 28) on October 28, 2016.

Plaintiffs appear to be seeking an advisory opinion relating to any Motion to Dismiss filed in response to the First Amended Complaint. This is, however, improper. FCE has now filed a Motion to Dismiss and Motion to Strike portions of the First Amended Complaint, and Plaintiffs should address any objections they may have to **that Motion** in an Opposition to **that Motion**.

FCE disputes arguments raised in the Opposition, including but not limited to arguments that the previously alleged causes of action for fraud and unjust enrichment are not preempted and that the cause of action for fraud was pleaded with sufficient

particularity. However, it would be improper for FCE to brief those issues in response to a now moot motion. Accordingly, FCE respectfully requests this Court disregard Plaintiffs' Opposition (Document 32), and refrain from issuing a ruling on FCE's Motion to Dismiss (Document 20).

**III. CONCLUSION**

Because FCE's Motion to Dismiss the original Complaint is now moot, FCE respectfully requests this Court disregard Plaintiffs' Opposition to and refrain from issuing a ruling on that Motion.

Respectfully Submitted this 14th day of November, 2016.

Goosmann Law Firm, PLC

/s/ Heather C. Sazama

Jeana L. Goosmann (SD Bar ID 3359)  
Heather C. Sazama (SD Bar ID 4075)  
5010 S. Minnesota Avenue  
Sioux Falls, SD 57108  
605.371.2000 (phone)  
605.275.2039 (fax)  
GoosmannJ@Goosmannlaw.com  
SazamaH@goosmannlaw.com

and

Robert D. Eassa (*Pro Hac Vice*)  
Marc A. Koonin (*Pro Hac Vice*)  
Sedgwick LLP  
333 Bush Street, 30th Floor  
San Francisco, CA 94104-2834  
415.781.7900 (phone)  
415.781-2635 (fax)  
Robert.Eassa@sedgwicklaw.com  
Marc.Koonin@sedgwicklaw.com

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served via the Court's ECF system on November 14, 2016, upon counsel of record for parties.

By: /s/ Autumn Nelson  
Autumn Nelson